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IN THE

Supreme Court of the United States

October Term, 1960

No. 87

TAMPA ELECTRIC COMPANY,
Petitioner,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. AND WEST KENTUCKY COAL COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The majority opinion (Miller, Chief Judge, and Cecil, J.) and the dissenting opinion (Weick, J.) of the United States Court of Appeals for the Sixth Circuit (R. 64-92),[1] filed on April 4, 1960, are officially reported at 276 F. 2d 766, *et seq.* The opinion (Wm. E. Miller, D.J.) of the United States District Court for

[1] The designation "R." will refer to the printed record. The designation "PB" will refer to petitioner's brief in this Court.

the Middle District of Tennessee, Nashville Division (R. 44-56), filed on November 18, 1958, is officially reported at 168 F. Supp. 456, *et seq.*

QUESTIONS PRESENTED

1. In an action brought by petitioner for declaratory judgment, did the courts below err in refusing, under Section 3 of the Clayton Act, to declare "valid, lawful and enforceable", and to enforce, a "requirements" contract which for 20 years commits the total coal purchases of a large utility to a single vendor, to the exclusion of hundreds of other willing and available sellers, in amounts exceeding the total annual coal consumption of the State of Florida?

2. In addition to Section 3 of the Clayton Act, do not the provisions of Sections 1 and 2 of the Sherman Act forbid a declaration that the contract is valid, lawful, and enforceable?

STATUTES INVOLVED

Both lower courts disposed of the case under Section 3 of the Clayton Act (38 Stat. 731, 15 U.S.C. § 14). In pertinent part, this section provides:

> "It shall be unlawful for any person . . . to lease or make a sale or contract for sale of goods . . . for use, consumption, or resale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Respondents also challenged the contract as unlawful under Sections 1 and 2 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. §§ 1-2), but the courts below did not find it necessary to consider the Sherman Act questions (R. 55, 74).

STATEMENT OF THE CASE

1. The nature of the case

This is an action for declaratory judgment, brought by petitioner pursuant to the declaratory judgment provisions of the United States Code. 28 U.S.C. § 2201 (Complaint, R. 4). Petitioner seeks a declaration that a 20 year requirements contract, here in issue, is "a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants according to its terms" (R. 6).

In careful and detailed opinions, the District Court and the Sixth Circuit held that the contract was unlawful under Section 3 of the Clayton Act (R. 44-56, 64-92). Accordingly, the requested relief was denied and judgment was entered dismissing the complaint (R. 56, 64).

No coal has been delivered under the contract. Prior to the time for first delivery, respondents notified petitioner that they would not proceed with deliveries under the terms of the contract because of the advice of counsel that the contract was unlawful and unenforceable (R. 6, 20). Petitioner thereafter arranged to obtain its coal by contract with another supplier pursuant to a year-to-year contract, discussed below (R. 26-27).

Petitioner then filed its complaint which prays a declaration of the contract's validity as an entirety for its full 20 year term, and judicial enforcement of the contract "according to its terms" (R. 6).

The complaint seeks the prospective relief of enforcement of the contract in the form of a declaration of its validity and a decree enforcing its performance for its entire 20 year period. Respondents' defense is that this very contract is in itself prohibited by the antitrust laws, particularly Section 3 of the Clayton Act.

Both sides filed motions for summary judgment and supporting affidavits (R. 23-27, 28-43). The District Court granted respondents' motion and ordered the complaint dismissed. The Court of Appeals affirmed.

2. The facts

There is no dispute as to the facts. The contract was made between petitioner and respondents' predecessor (R. 5-6). It provided for the purchase and sale of all coal required by petitioner in existing and planned coal-burning facilities.[2] The contract expressly stipulated that the seller, for 20 years from the first delivery of coal under the contract, was "to supply the *total requirements*[3] of fuel of the Buyer for the operation of its first two units to be installed at [Buyer's] Gannon Station . . . which fuel requirements shall be not less than 225,000 tons of coal per unit per year" (R. 7). It was further agreed that "if during the first 10 years of the term of this contract the Buyer constructs additional units in which coal is used as the fuel . . . the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer" (*ibid.*).

Six units were planned from the start (PB 3; R. 30). A third coal-burning unit was in fact under

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[2] Paragraph 8 of the Complaint described the contract as "a contract providing for the sale and delivery to plaintiff [petitioner] of *all of the coal* required by plaintiff for the production of electric energy at a new plant it was constructing . . ." (R. 5).

[3] Italics supplied here and elsewhere unless otherwise indicated.

construction when the suit was brought (PB 5; R. 31). The contract covered the requirements of this unit, as well as the first two, and also of any other coal-burning units that might be constructed within 10 years from the date of first delivery of coal under the contract. The term of the contract was specified as 20 years from first delivery (PB 5; R. 12). The contract contained no cancellation clause (R. 7-12). The minimum contract price was fixed as $6.40 per ton (R. 9-10).

The Gannon Station was and remains petitioner's only coal-burning facility. When the contract was signed in 1955, petitioner's two other plants were oil-burning (R. 30; PB 8). They are "presently oil burning" (PB 9, 10). The contract in issue engrosses petitioner's total existing coal requirements for its prescribed 20 year term.

Petitioner's actual coal requirements far exceed the minimum quantities specified in the contract. In a year-to-year contract made with another supplier after cancellation of the present contract, petitioner estimated its actual coal requirements as 700,000 tons in each of the years 1959 and 1960; 1,000,000 tons in 1961; and thereafter to "increase as required to about 2,250,000 tons per year" (PB 5; R. 27).

These requirements are most substantial. They far exceed, in terms of fuel equivalent, petitioner's total consumption in its oil installations, which corresponds to 825,000 tons of coal (R. 31). The minimum 700,000 ton consumption in 1960 equals the total amount of coal otherwise consumed in all of Peninsular Florida, also about 700,000 tons, when the contract was made (PB 6). Petitioner concedes "that within a very few years the Gannon Station would consume more coal

than was presently consumed in the entire State of Florida" (PB 6).

The dollar value of petitioner's coal requirements amounts to millions of dollars annually. At the minimum price of $6.40 per ton and the 1961 requirement of 1,000,000 tons (which petitioner says will increase to 2,250,000 tons), the annual value is $6,400,000 or $128,000,000 over the twenty-year period (R. 72).

Suitable coal for petitioner's coal requirements was and remains available from many suppliers. Petitioner admits that when the contract was executed

> "Potter Towing Company, the original contractor, was but one of some 700 coal producers who were not only able but 'eager' to sell coal to petitioner" (PB 6).

While this case was pending, petitioner's president testified as follows in a 1958 proceeding before the Florida Railroad and Public Utilities Commission (R. 62):

> "Q. Now, have you contacted any other company to see——
>
> A. Coal companies?
>
> Q. Coal companies.
>
> A. We have coal companies in and out of our office so fast that the receptionist doesn't know where to seat them to give them time to talk to people."
>
> * * *
>
> "A. We have received innumerable offers of coal at various prices per ton. I couldn't possibly sit here and remember which price of coal per ton related to the BTU's per pound or any number of such things."

Petitioner did not need to make a 20 year contract to obtain its coal requirements. In fact, petitioner

later made a contract, to replace the contract in issue, with Love & Amos Coal Company, on a 12-month basis. That contract expressly provided: "Cancellable on 12 months notice by supplier or purchaser" (R. 27).[4]

At the time that petitioner filed the present action for declaratory judgment, no coal had been delivered under the contract in issue (R. 6).

SUMMARY OF ARGUMENT

This is an action for declaratory judgment under 28 U.S.C. § 2201 (Complaint, R. 4). It seeks the prospective relief of a declaration that a 20 year, full requirements contract for coal is "a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, according to its terms". No coal has been delivered under the contract (R. 5-6; PB 5). There is no cancellation clause (R. 7-12).

If petitioner were granted relief, the "judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Clayton] Act" (*Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959). That conduct is the performance of a contract foreclosing all competitors of the seller from any opportunity to supply the buyer's coal requirements for a period of 20 years.

As an avowed "total requirements" agreement, covering all of petitioner's coal-burning facilities, the contract is "a particular form of agreement specified by Section 3" (*Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 311 (1949)).

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[4] The Love & Amos contract further provided (*ibid.*):

"In the event West Kentucky Coal Company should begin to perform under our original contract with Nashville Coal Company this agreement will terminate forthwith."

The 20 year term of the contract compounds the offense.

> "As a competition killer the long term contract is an effective weapon, . . ." Even a patentee is not so secure against the passage of time" (*United States* v. *Pullman Co.*, 50 F. Supp. 123, 129 (E.D. Pa. 1943), *aff'd* 330 U.S. 806 (1947)).

A duration of more than one year for requirements contracts has been held excessive under both the Sherman and Clayton Acts. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 395-397 (1953); *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978, 982 (N.D. Ill. 1949); *United States* v. *American Can Co.*, 87 F. Supp. 18, 31 (N.D. Cal. 1949).

The contract covers all of petitioner's existing and planned facilities in which coal can be burned. The decisions of this Court are opposed to the argument that Section 3 is inapplicable because possible, and entirely theoretical, future developments might enable petitioner to buy coal outside of the contract. In *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 354-355 (1922), it was held immaterial that the exclusion was limited to the buyer's existing "premises". In *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), Section 3 condemned the contracts although satisfactory competing machines were available and the customers could buy and use them free of International's restraint.

Section 3 applies to a single contract. It prohibits "*a* sale or contract for sale" . . . "on the condition, agreement or understanding that the *lessee* or *purchaser* . . . shall not use or deal in the goods of *a com-*

petitor or competitors of the *lessor* or *seller.*" Section 3 is not confined to sales for resale. It expressly applies to a lease or sale "*for use, consumption or resale*".

Petitioner's use of oil is beside the point. Section 3 forbids the foreclosure of "*a* competitor or competitors of the lessor or seller . . . *in any line of commerce.*" Coal is "*one* out of *all* the various lines of commerce" (*George Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 253 (1929)). It has "sufficient peculiar characteristics and uses" to distinguish it from oil (*United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-594 (1957)).

For Section 3 purposes there is no relevance in the *Cellophane* case standard of interchangeability (PB 15, n. 3). *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956). Coal and oil are not interchangeable in petitioner's facilities. The question in the *Cellophane* case was the existence of monopoly power violating Section 2 of the Sherman Act in the absence of evidence of any "alleged attempt to monopolize or conspiracy to monopolize" (351 U.S. at 370). The Court emphasized that it was not confronted with a case involving a specific practice eliminating competition. It said (351 U.S. at 395):

> "Illegal monopolies under § 2 may well exist over *limited products in narrow fields where competition is eliminated.* That does not settle the issue here."

The scope of the present inquiry is properly confined to "limited products in narrow fields" in view of the actual elimination of competition. There are 700 qualified sellers "not only able but 'eager' to sell coal to

petitioner" (PB 6). Petitioner has "received innumerable offers of coal at various prices per ton" (R. 62).

The effect of the present contract "may be to substantially lessen competition or tend to create a monopoly" (38 Stat. 731, 15 U.S.C. § 14). Petitioner's own estimates of the actual annual requirements of its coal plant are 700,000 tons in 1959 and 1960; 1,000,000 tons beginning in 1961; and, ultimately, "2,250,000 tons per year" (PB 5, R. 27). At the 1960 level of 1,000,000 tons, and the minimum contract price of $6.40 per ton, the preemption is $6,400,000 annually or $128,000,000 over the 20 year contract term. This total exceeds the amount of coal otherwise consumed in Florida (PB 6).

The volume of preemption overwhelmingly satisfies Section 3. In *International Salt*, where the tying contracts preempted only $500,000 of business annually (332 U.S. 395), this Court held that:

> "The volume of business affected by these contracts cannot be said to be insignificant or insubstantial."

In *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 608-609 (1953), the Court confirmed the rule that evidence of the restraint of "a substantial volume of commerce" alone condemns a contract subject to Section 3.

Section 3 requires no proof of the seller's dominance or economic leverage over the buyer. In *Standard of California, supra*, the Court expressly recognized that the seller did not have a dominant position in the market (337 U.S. at 302, 309). In *Times-Picayune, supra*, the Court pointed out that Section 3 is violated either when "a monopolistic position in the market" is enjoyed by the seller "*or*" when there is restraint "of

a substantial volume of commerce". The emphasis on the disjunctive is in the Court's opinion. (345 U.S. at 608-609).

If a seller's "leverage" limitation were read into Section 3, the statute would have little or no application to the soft coal industry. It is a chronically depressed industry in which buyers historically dominate sellers. Excess productive capacity has made "the market for coal a buyers' market for many years past." (*Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 364 (1933)). The same condition persists today. Petitioner agrees that when it made the contract with respondents' predecessor, "the seller was faced with intense competition in the depressed coal industry" (PB 40; n. 21).

The economic leverage concept would seriously encumber the administration of Section 3. To demand evidence of the parties' comparative economic strength "would be a standard of proof if not virtually impossible to meet, at least most ill-suited for ascertainment by courts" (*Standard Oil Co. of California, supra*, 337 U.S. at 310).

Petitioner's attempted economic justifications are irrelevant. The Court in *Standard* exhaustively reviewed all possible economic advantages of requirements contracts, including those pressed by petitioner in this case (337 U.S. at 306-308). But it held them irrelevant, stating:

> "Congress has authoritatively determined that [requirements] practices are detrimental where their effect may be to lessen competition. It has not left at large for determination in each case the ultimate demands of the 'public interest'" (337 U.S. at 311).

There was no necessity for a 20 year requirements contract in the present case. This is clear from petitioner's replacement contract with Love & Amos Coal Company. This expressly provides: "Cancellable on 12 months notice by supplier or purchaser" (R. 27). It is also admitted that petitioner "received innumerable offers of coal at various prices per ton" (R. 62).

Petitioner cannot escape the force of Section 3 on the basis of the legislative debates. In *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 357 (1922), a Section 3 requirements case, the Court said:

> "Much is said in the briefs concerning the reports of committees concerned with the enactment of this legislation, but the words of the act are plain, and their meaning is apparent, without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports."

In any event the legislative utterances which petitioner cites are directly refuted by other utterances of equal or greater dignity. See, e.g., 51 Cong. Rec. 9072, 9388-9, 9402, 9406, 14,210; S. Rep. No. 698, 63rd Cong., 2d Sess., 1914, p. 1; H. Rep. No. 627, 63rd Cong., 2d Sess., 1914, p. 12.

Petitioner's final point—that the seller cannot raise the defense of violation of Section 3—means that petitioner is asking this Court to command the seller to proceed, for 20 years, with the performance of an unlawful act. This is prohibited by the doctrine of *Kelly* v. *Kosuga, supra,* 358 U.S. 516, 520, that relief will be denied where "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act." Compare *Continental Insurance Co.* v.

United States, 259 U.S. 156, 171-173 (1922); *Texas & Pacific Railway Company* v. *S. O. Pottorff*, 291 U.S. 245, 260 (1934); *Weil* v. *Neary*, 278 U.S. 160 (1929); *Sage* v. *Hampe*, 235 U.S. 99 (1914); *St. Louis V. & T.H.R. Co.* v. *Terre Haute & I.R. Co.*, 145 U.S. 393 (1892); *Gibbs* v. *Consolidated Gas Co. of Baltimore City*, 130 U.S. 396 (1889).

This line of argument is incompatible with the overriding public policy of the Clayton Act. Cf. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 177 (1942); *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U.S. 249, 257 (1945).

The formula used in Section 3 appears throughout the Clayton Act. For example, Section 7 provides "that no corporation . . . shall acquire" the stock or assets of another in certain circumstances (38 Stat. 731, as amended 64 Stat. 1125, 15 U.S.C. § 18). Petitioner's thesis would mean that the selling company in an unlawful merger under Section 7 could nevertheless compel performance by the buyer, because the statute reads only that "no corporation shall acquire".

Petitioner's thesis is also unfair. It would mean that the buyer could at any time terminate its performance, but the seller would be bound for 20 years. Further, petitioner's position would invalidate the contract for lack of mutuality of obligation. Compare *Jarrett* v. *Pittsburgh Plate Glass Co.*, 131 F. 2d 674, 676 (5th Cir. 1942).

Although the lower courts did not reach the Sherman Act questions, they may be considered here. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951). The contract is also invalid under the Sherman Act.

The 20 year term of the contract is indefensible by Sherman Act standards. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953); *United States* v. *Pullman Co., supra*, 50 F. Supp. at 129; *United States* v. *American Can Co., supra*, 87 F. Supp. at 31. Considering the substantial size of the market preempted, the contract embodies an unreasonable restraint within the meaning of the Sherman Act. *International Salt, supra*, 332 U.S. at 396.

ARGUMENT

A. THE COMPLAINT SEEKS SPECIFIC ENFORCEMENT OF THE UNLAWFUL CONTRACT: OF "THE PRECISE CONDUCT MADE UNLAWFUL BY THE CLAYTON ACT".

The complaint alleges, and the answer admits, that enforcement is sought of

> "a contract providing for the sale and delivery of all the coal required by plaintiff for the production of electrical energy at a new plant it was constructing near Tampa, Florida, for a period of twenty years" (R. 5, 19).

The complaint further alleges that respondents refused to perform the contract "on the ground that said contract is violative of Section 3 of the Clayton Act" (R. 6). This is also admitted by the answer (R. 20).

The relief sought is a "judgment declaring" that the contract

> "is a *valid, lawful and enforceable contract* and is binding upon the plaintiff and defendant, *according to its terms*" (R. 6),

The complaint reveals on its face that such a "judgment of the Court would itself be enforcing the pre-

cise conduct made unlawful by the [Clayton] Act" (*Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959)). That conduct is the performance of a contract foreclosing all competitors of the seller from any opportunity to supply the buyer's coal requirements for a period of 20 years.

Unlike the contract enforced in *Kelly* v. *Kosuga*, the unlawful agreement is not collateral to the contract which petitioner would enforce. The contract in issue is, in and of itself, the unlawful agreement. The Clayton Act violation is the coal sale contract between buyer and seller which petitioner asks the Court to declare lawful and to enforce "according to its terms".

In *Kelly* v. *Kosuga*, the alleged Sherman Act violation was not the onion sale contract between the litigating seller and buyer. That contract merely "furnished the occasion for [the] restrictive agreement. . . ." (358 U.S. at 521). As the Court said, the contract there in suit was a "lawful sale for a fair consideration [which] constitutes an intelligible economic transaction *in itself*" (358 U.S. at 521). The Sherman Act defense was based on circumstances collateral to that contract, namely an agreement "not to deliver any onions on the futures market for the remainder of the current trading season" (358 U.S. at 517).

In *Kelly* v. *Kosuga*, the onions had been delivered or set aside for delivery to the buyer. The buyer had made some payments for the onions, but had not paid the balance. The action was for the balance due. It was the Court's position that "it can hardly be said to enforce a violation of the [Sherman] Act to give

legal effect to a completed sale of onions at a fair price" (358 U.S. at 521).[5]

In the present case, however, no coal has been delivered under the contract. If the Court enforces this contract "according to its terms", it will "give legal effect" to an executory contract embodying the precise exclusion of competition prohibited by the Clayton Act.

This contract is annexed to the complaint as "Exhibit A" (R. 5, 7-12). Its terms, as written, violate Section 3 of the Clayton Act, according to decisions of this Court.

If this Court should reverse the lower courts and enforce the present contract, it would be inviting the proliferation in our economy of a powerful anti-competitive contractual device: the long-term requirements contract. This device would remove huge segments of commerce from the competitive market-place; it would tie producing and selling companies together in arrangements secured against competitors. As the three-judge trial court said of 25 year contracts in *United States* v. *Pullman Co.*, 50 F. Supp. 123, 129 (E.D. Pa. 1943), *aff'd* 330 U.S. 806 (1947):

> "As a competition killer the long term contract is an effective weapon. . . . Even a patentee is not so secure against the passage of time."

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[5] The Court expressly pointed out that if the action had sought enforcement of the collateral agreement to withhold onions from the future's market, relief would have been denied: ". . . the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed . . ." (358 U.S. at 521).

In the present case, the contract not only effectively ties a particular seller to a particular buyer for 20 years; it also removes from the competitive market a majority of the coal business of the entire State of Florida (see pp. 5-6, *supra*).

B. THE CONTRACT IS WITHIN THE CATEGORY PROHIBITED BY SECTION 3: A CONTRACT "ON THE CONDITION, AGREEMENT OR UNDERSTANDING" THAT THE BUYER WILL NOT "USE OR DEAL IN" THE GOODS OF A COMPETITOR OR COMPETITORS OF THE SELLER, WHICH SUBSTANTIALLY LESSENS COMPETITION IN A LINE OF COMMERCE.

1. The contract excludes other suppliers of coal

Petitioner's basic argument is that the contract does not come within the category prohibited by Section 3 (PB 13-19). We respectfully submit that this argument is totally foreclosed by the statute and the decisions of this Court. *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949); *United States* v. *Richfield Oil Corp.*, 343 U.S. 922 (1952); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922); see also *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954).

Petitioner first seems to rely upon the fact that the contract does not contain any express exclusion of competitors (PB 13). This, of course, is immaterial. The Court has already ruled that a requirements contract is "a particular form of agreement specified by Section 3" (*Standard of California, supra*, 337 U.S. at 311).

Petitioner next contends that it might in the future convert any of its presently oil-burning units to coal,

and that it might construct new coal-burning units after the lapse of 10 years from the date of first deliveries under the contract. If either of these events occurred, petitioner states, the contract would not confine the coal requirements of such units to respondents.

The answer to these contentions may be succinctly stated. The contract covers *all* of petitioner's existing requirements of coal, for a 20 year period. The contract totally excludes, for 20 years, any competitor from this huge market for coal, which petitioner itself estimated would rise to 2,250,000 tons per year (R. 27).

As the Court of Appeals found: "At the time the contract was made, there were no coal burning units not covered by the contract. There is nothing to indicate any planned or probable conversion of oil burning units into coal burning units or construction of coal burning units not covered by the contract.[*] The contract requires the appellant to purchase all of its present, and its planned future, requirements of coal from a single seller." (276 F. 2d at 772; R. 71).

The Court of Appeals expressed its agreement with the conclusion of the District Judge that "[t]he question must be decided upon the basis of realities and the contract construed reasonably in the light of existing facts" (276 F. 2d at 772, R. 71; 168 F. Supp. at 458, R. 47). The Court of Appeals added that "The remote possibility that a buyer might use a competitor's product is an immaterial factor in the actual picture before

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[*] *After* commencement of this litigation, petitioner procured an offer from Peabody Coal Co. to furnish coal for two of its oil-burning units if petitioner should convert them. The offer was not accepted by petitioner, and there is no indication anywhere in the record of an intention to convert. (PB 14).

the Court", citing authorities (276 F. 2d at 772; R. 71-72).[7]

As the District Judge concluded, "the unalterable fact remains that the contract at issue is one which 'pre-empts' or 'engrosses' *all of the known coal requirements of the Buyer*—manifestly a large and substantial volume of commerce—for a period of 20 years" (168 F. Supp. at 458-459; R. 47).

As we shall show, pp. 20-21, *infra*, the decisions of this Court have in substance rejected petitioner's position that possible future developments which might enable it to buy coal outside of the contract are entitled to consideration. Indeed, if petitioner's argument were accepted, it is difficult to visualize any contract that might be outlawed under Section 3. It could always be established that the buyer might possibly have future needs that are not covered by the requirements contract.

For example, if General Motors contracted for the total steel requirements of all of its plants from Bethlehem Steel for 20 years, the contract could be defended on the grounds that General Motors might build ad-

[7] It is clear that petitioner contemplated that all of its Gannon units would use coal, and would be covered by the contract. Petitioner does not assert the contrary, and the record contains the following indication: Six units were projected for the Gannon station. In its contract with Love & Amos Coal Company, made after cancellation of the present contract, petitioner estimated its requirements for the Gannon station as about 2,500,000 tons per year commencing after 1961 (about 5 years after commencement of the term of the contract). It is probable that this contemplated that all 6 units at Gannon would use coal: *viz.*, 2,250,000 tons for 6 units equals 375,000 tons per unit; compare this with the minimum guarantee of 225,000 tons for each of the first two units, and actual 1960 requirements for both of 700,000 tons, or 350,000 tons per unit.

ditional plants and competing steel suppliers would be able to compete for the custom of those plants. The result would be the practical elimination of Section 3 of the Clayton Act as an instrument of effectuating the national policy of assuring "freedom to buy . . . in an open competitive market," and " freedom to sell". *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959).

In any event, this Court has rejected the proposition advanced by petitioner. In *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922), this Court considered a contract under Section 3 of the Clayton Act requiring the buyer to purchase from the seller his total requirements of goods bought for resale at the buyer's existing "premises". The defense was made that this contract did not exclude competitors because goods might be bought elsewhere for resale at other "premises." This Court rejected the argument, as follows (258 U.S. at 354-355):

> ". . . It is idle to say that the covenant was limited to the premises of the purchaser, and that sales might be made by it elsewhere. The contract should have a reasonable construction. The purchaser kept a retail store in Boston. It was not contemplated that it would make sales elsewhere. . . ."

Indeed, this Court has held that a contract committing the buyer to a single seller may foreclose competition within the prohibition of Section 3 even if the buyer could in fact avoid its provisions by dealing with others. In *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), lessees of defendant's salt machines entered into contracts to buy all salt used in the machines exclusively from the defendant. Satis-

factory competing machines were available, and the lessee was free to obtain such machines and to buy salt to be used in them from defendant's competitors. This Court nevertheless held that the agreement to buy from the defendant all salt to be used in defendant's machines violated Section 3. As the Court stated in *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 10, n. 8 (1958):

> "As a matter of fact the defendant in International Salt offered to prove that competitive salt machines were readily available which were satisfactory substitutes for its machines (a fact the Government did not controvert), but the Court regarded such proof as irrelevant."[8]

This feature of *International Salt* was not novel. It is a common feature of the tying cases that the buyer is able to escape the restriction or does in fact deal with competing suppliers. See, *e.g.*, *International Business Machines Corp.* v. *United States*, 298 U.S. 131 (1936); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48, 52 (4th Cir. 1942); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (1st Cir. 1945), *cert. denied*, 326 U.S. 776 (1945); *Osborn* v. *Sinclair Refining Company*, —— F. 2d —— (4th Cir. 1960), reported in CCH Trade Regulation Reporter, Current Cases, ¶ 69,771. There was proof in the latter three cases that buyers were actually using machines or products, or both, competitive with those supplied under the outlawed tying agreements.

The principle of these cases is applicable to requirements contracts. This Court has held in *Standard*

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[8] See also the reference to *International Salt* in *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 305 (1949).

Oil Co. of California, supra, that no distinction is to be drawn in the tests to be applied under Section 3 between tying and requirements cases.[9] The statutory inquiry in both cases is the same: is there an arrangement—whether in the form of a tying agreement or a requirements contract—"on the condition, agreement, or understanding that the lessee or purchaser . . . shall not use or deal in the goods . . . of a competitor or competitors of the seller."

In the present case there is no room for debate as to whether the statutory requirement is satisfied. The facts are that the contract covers seller's total needs for coal and that the exclusion of competitors of the seller in the coal business is unqualified. The buyer does not use coal from any other source; it has no facilities for using coal except under the contract. It is idle for petitioner to urge this Court to read Section 3 so as to exclude the present contract.

Indeed, not only is this a "total" requirements contract; it is also an engrossment of the prescribed mar-

[9] In *Standard Oil Co. of California, supra*, this Court considered at length whether "a distinction is to be drawn for purposes of the applicability of § 3 between requirements contracts and contracts tying the sale of a non-patented to a patented product" (337 U.S. at 305). But it concluded that a distinction in the "tests" would lead to "serious difficulties" (337 U.S. at 308), and "would . . . stultify the force of Congress' declaration that requirements contracts are to be prohibited wherever their effect 'may be' to substantially lessen competition" (337 U.S. at 313).

It should be noted that the economic effect of a requirements contract on competition is even more pronounced than a tie-in contract. The ordinary tie-in agreement leaves room for the buyer to escape his commitment to the seller by using other equipment. It leaves room for other sellers to overcome the commitment by providing different equipment. Realistically, the requirements contract leaves no way for the buyer or competing sellers to overcome the exclusionary arrangement.

ket and an exclusion of all competitors for a period of years which in itself is a "competition-killer".[10] This is a 20 year non-cancellable contract. A term in excess of one year has been condemned as excessive in requirements contract cases arising under both the Sherman Act and Section 3 of the Clayton Act. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 395-397 (1953); *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978, 982 (N.D. Ill. 1949); *United States* v. *American Can Co.*, 87 F. Supp. 18, 31 (N.D. Cal. 1949). The term of the outlawed contract in *Standard Fashion Co.* v. *Magrane-Houston Co., supra,* was only two years (258 U.S. at 351-352). Most of the contracts in *Standard of California, supra,* were binding for only six months (337 U.S. at 296).

In an attempt to establish that Section 3 does not cover the present contract, petitioner advances a number of other arguments designed to re-cut the cloth of Section 3 to fit its needs.

First, it essays the suggestion that Section 3 does not apply to a contract to supply "the requirements of a single consumer" (PB 20). The short answer is that the statute is expressly phrased in the singular. It prohibits "*a* sale or contract for sale . . . on the condition, agreement or understanding that the *lessee*

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[10] As was said of 25-year contracts in *United States* v. *Pullman Co., supra,* 50 F. Supp at 129:

> "As a competition killer the long term contract is an effective weapon. . . . Even a patentee is not so secure against the passage of time."

or *purchaser* . . . shall not use or deal in the goods of a competitor or competitors of the *lessor* or *seller* . . . ."[11]

Second, it is perfectly clear that Section 3 is not confined, as petitioner elaborately argues, to sales for resale. It expressly applies to a lease or sale "for *use, consumption or resale*". Indeed, most of the cases in which Section 3 has been applied relate to commodities used in manufacturing processes.[12]

Third, petitioner claims that the present contract, despite its terms and scope, should be regarded as "a contract for a fixed amount" and therefore outside the reach of Section 3 (PB 16). The fact of the matter is that the contract is avowedly for "total requirements", whatever their volume. In the words of the Complaint, it is "a contract providing for the sale and delivery . . . of *all* of the coal required by plain-

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[11] The Report of the Attorney General's Antitrust Committee recognizes that there are circumstances in which Section 3 applies to a single contract with a single customer in a single local market. In its words, "the industry's characteristic retailing structure may not enable more than one outlet in a particular consuming area, so that an exclusive arrangement which ties up any single customer shuts off a significant local market." (Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 147).

[12] See, e.g., *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *United Shoe Machinery Corp* v. *United States*, 258 U.S. 451 (1922); *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F.2d 552, 559 (4th Cir. 1950), *cert. denied*, 340 U.S. 906 (1950); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F.2d 952 (1st Cir. 1945), *cert. denied*, 326 U.S. 776 (1945); *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F.2d 764 (6th Cir. 1936); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F.2d 48 (4th Cir. 1942).

tiff for the production of electric energy at a new plant . . . for a period of 20 years . . ." (R. 5).[13]

The contract at issue is, therefore, a requirements contract, and not some other type of arrangement, and it is the actual contract made by the parties that is before the Court. Even if—which is not the case—the parties had considered an alternative contract, the Court would base its decision upon the realities and the actualities of the contract executed by the parties. In *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451 (1922), it was urged that Section 3 did not apply to the challenged leases "because the parties were offered an alternative lease alleged to be free from objectionable conditions complained of" (258 U.S. at 464). The Court answered that the issue was to be decided on the basis of the provisions in the agreements before it.[14]

Petitioner suggests, however, that despite its plain language, the present contract should be considered a contract for a fixed amount of coal because the quantities that it requires "can easily be translated into an approximate number of tons. . . ." (PB 18). This would be of no consequence, even if it were established, because whether it is easy or difficult to translate the needs of the units into tons, the fact is that

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[13] The facts of this case preclude reliance on *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U.S. 463 (1923). In *Sinclair* the buyer was simply required to use Sinclair pumps *if* he elected to sell Sinclair gasoline. The Court emphasized that the buyer was free "*to buy wherever he chooses*" and to "discontinue" dealings with Sinclair at his election (261 U.S. at 474).

[14] As the Court put it (*ibid.*):

> "the fact that a form of lease was offered which is not the subject of controversy is not a justification of the use of clauses in other leases which we found to be violative of the act."

the contract preempts not a specified amount, but the "total requirements".

The facts, moreover, show the complete lack of substance in petitioner's argument. In the first place, the contract is open-end. It guarantees purchase of 450,000 tons per year. It then commits the buyer to purchase all additional "fuel requirements" for its Gannon Station, whatever they may be, needed to supply the actual needs of the first two units and all other coal-burning units built at Gannon during the first ten years of the contract period.[15] The quantities were actually much greater than the minimum guarantee.

This is not a contract for a fixed amount which permits competition for the buyer's needs in excess thereof. It is a contract for the buyer's total requirements for all of its existing and planned needs. No area remains in which other coal producers may compete for access to this huge segment of commerce. As the Court of Appeals found in this case, the requirements contract " 'effectively foreclose[s] whatever opportunity there might be for competing suppliers to attract his patronage' " (276 F. 2d at 771; R. 70). Accordingly, there can be no doubt that it comes within the category of contracts to which Section 3 applies.

2. Petitioner's use of oil in other facilities is irrelevant, since coal itself is a "line of commerce."

Petitioner attempts to remove the present contract from the scope of Section 3 by reference to its use of oil in facilities not covered by the contract. This is entirely irrelevant.

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[15] Petitioner gets no benefit from *Board of Trade of Chicago* v. *United States*, 246 U.S. 231 (1918), cited at PB 19. The doctrine of this case was held immaterial under Section 3 in *Standard Oil of Calif.*, *supra* (337 U.S. at 313).

The issue here is the elimination for 20 years of competing suppliers of coal. Coal is a separate and distinct "line of commerce". Section 3 forbids the foreclosure of *"a* competitor or competitors of the lessor or seller . . . *in any line of commerce."* In construing the identical language of Section 2 of the Clayton Act, this Court ruled (*George Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 253 (1929)):

> "The phrase is comprehensive, and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in any line of commerce' literally are satisfied. . . . The words being clear, they are decisive. There is nothing to construe." (Emphasis in original).

The phrase "line of commerce" reaches any class of goods with "sufficient peculiar characteristics and uses" to distinguish it from kindred products. *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-594 (1957); see also *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 595 (S.D. N.Y. 1958).

To paraphrase the Court in the *Van Camp* and *duPont* cases, coal is *"one* out of *all* the various lines of commerce" and it has "sufficient peculiar characteristics and uses" to distinguish it from oil. The two fuels cannot be burned in the same equipment. They require different handling and storage equipment. The peculiarly distinctive nature of the soft coal industry has been recognized by this Court and by Congress. *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940).

In any event, discussion concerning oil has no bearing in the present case. By reason of this contract,

petitioner is *not* free to substitute oil for coal, even if this could be done as a practical matter. Under this contract, petitioner is committed to use coal in all of the facilities which come under the contract, and to take that coal under the contract for 20 years. The contract commits the petitioner to take under its terms "the total requirements of *fuel*" for the first two units, and for any additional units constructed in the stated 10 year period to use coal as fuel. Petitioner cannot buy any part of its requirements from another coal producer, nor—even if it were feasible—could it, under the contract, convert those units to burn oil and obtain oil from other suppliers at any time within the 20 year period of the contract. Accordingly, reference to the possibility of competition between coal and oil is totally groundless so far as the requirements of the committed units is concerned.[16]

If the governing legal principle prevented application of Section 3 to contracts covering a particular commodity because of the existence of competing products, Section 3 would be inapplicable to many situations of critical importance in our economy. For example, if General Motors made a contract with a single supplier for its total requirements of steel, for 20 years, it

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[16] By the same token, there is no substance in the claim that the contract is not illegal because it reserves to the buyer the right to reduce the quantities of coal by 15% in order to use "some by-product as a fuel which would be supplied by some local customer of the Buyer" (R. 8; PB 14). There is no claim or evidence that this was ever contemplated or that such by-product fuel was available. In addition, the "by-product" would not be coal. Hence the contract would still foreclose completely the competitive opportunities of other coal suppliers for 20 years.

could be argued that since steel is competitive with aluminum, the contract is not within the scope of Section 3. If Campbell Soup made a 20 year contract with American Can for its total requirements of cans, Section 3 would not apply because glass and plastics—and perhaps paper—are competitive with cans. Neither Section 3, nor any other provision of the Clayton Act using the phrase "line of commerce",[17] is susceptible of this destructive interpretation.

Petitioner also urges the relevance of the *Cellophane* case's standard of interchangeability (PB 15, n. 3). *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 400 (1956). But that case proves our point. It carefully distinguishes between "interindustry competition" and competition within the same industry, and it points out that:

> "one can think of building materials as in commodity competition but one could hardly say that brick competed with steel or wood or cement or stone in the meaning of Sherman Act litigation: the products are too different" (351 U.S. at 393).

Obviously the same is true of oil and coal; and certainly they are not interchangeable in the facilities of petitioner that are preempted by this contract.

Further, the issue in *Cellophane* was whether duPont possessed monopoly power in the total market place. The present question is whether, under the particularized standards of Section 3 of the Clayton Act, the agreement eliminates the competition "of a competitor or competitors of the seller" of coal "where the effect

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[17] See Section 7 relating to mergers (15 U.S.C. § 18) and Section 2(a) relating to price discriminations (15 U.S.C. § 13(a).

. . . may be to substantially lessen competition in any line of commerce".

The *Cellophane* case did not involve a particularized act or agreement or course of conduct. The question was the existence of monopoly power violating Section 2 of the Sherman Act in the absence of evidence of any "alleged attempt to monopolize or conspiracy to monopolize" (351 U.S. at 379).

The Court was careful to stress the distinction even for purposes of Section 2 between a case of monopoly power and cases involving specific conduct which suppresses competition. It said (351 U.S. at 395):

> "Illegal monopolies under § 2 may well exist over *limited products in narrow fields where competition is eliminated.* That does not settle the issue here."

As instances in which Section 2 "had been extended to producers of single products and to businesses of limited scope", the Court cited "dissemination of news in a community and surrounding territory" and "Women's dresses of 'original design'" (*id.* at 395, note 23).

In the present case, the issue is extremely narrow. The question is simply whether the particular agreement eliminates competition by a competitor or competitors of the seller—in any line of commerce. In that context, the scope of the inquiry is properly confined to "limited products in narrow fields" (*duPont, supra*).

Accordingly, the broad economic interplay of varieties of products is not relevant to Section 3, and specifically, the general interaction in the market place

of other commodities involved is beside the point. We are not here considering whether the parties were able to dominate the market or to fix prices or control output. We are considering a specific contract for a specific commodity that violates a specific prohibition of the law.

As this Court said in *Standard Oil Co. of California, supra*, "To insist upon such an investigation [of the same broad economic scope permitted by the Sherman Act] would be to stultify the force of Congress' declaration that requirements contracts are to be prohibited wherever their effect 'may be' to substantially lessen competition" (337 U.S. at 313). As the Court further said in that case: "We are dealing here with a particular form of agreement specified by § 3 and not with different arrangements" (337 U.S. at 311).

The Court has thus emphasized that the practices which Section 3 outlaws are, by Congressional definition, anti-competitive: the elimination of a competitor or competitors in any line of commerce involving a substantial amount of commerce. Its prohibitions are specific and incisive: They extend to "*a* sale or contract" —to the foreclosure of "a competitor . . . of *the seller*".

On this record there is no doubt of the actual foreclosure of a host of sellers of coal other than the contracting party.

It is conceded that there are 700 qualified sellers "not only able but 'eage.' to sell coal to petitioner" (PB 6). Petitioner's president testified as follows (R. 62):

> "We have coal companies in and out of our office so fast that the receptionist doesn't know where to seat them to give them time to talk to people."

* * *

> "We have received innumerable offers of coal at various prices per ton. I couldn't possibly sit here and remember which price of coal per ton related to the BTU's per pound or any number of such things."

This case is accordingly governed by the following doctrine of *International Salt Co.* v. *United States, supra,* 332 U.S. 392, 398:

> "If others cannot produce salt equal to reasonable specifications for machine use, it is one thing; but it is admitted that, at times, at least, competitors do offer such a product. They are, however, shut out of the market by a provision that limits it, not in terms of quality, but in terms of a particular vendor."

In *Standard of California, supra,* the Court held that "there was no conclusive proof" that the requirements contracts "actually reduced competition", but this was held immaterial because Congress had "authoritatively" condemned such contracts as "detrimental" if they merely created "a potential clog" on a "substantial amount of competitive activity" (337 U.S. at 310, 311, 314). In this case there is an actual, not merely a "potential", clog on competition, and the clog suppresses a highly "substantial amount of competitive activity".

3. The contract violates the qualifying or "substantiality" clause of Section 3

There can be no doubt that the effect of the present contract "may be to substantially lessen competition or tend to create a monopoly" (38 Stat. 731, 15 U.S.C. §14). For the 20 year life of the contract, the contract seller is exclusively granted all of the business of any

coal-burning unit installed at the contract plant during the first 10 years of the contract term.

The amount of commerce and the 20 year duration of the contract in the present case far exceed the magnitude of the commerce involved in any Section 3 case heretofore adjudicated.

The present contract provides for a *minimum* annual purchase of 450,000 tons, at a minimum contract price of $6.40 per ton (R. 9-10). On an annual basis, this *minimum* preempts commerce in coal approximating $2,900,000. For the 20 year period, it commits to a single buyer and seller, a volume of $58,000,000.

The *actual* requirements engrossed by the contract are far greater. Petitioner's own estimates of the actual requirements of its coal plant appear in the substitute Love & Amos contract (PB 5; R. 27). They are 700,000 tons in 1959 and 1960; 1,000,000 tons annually beginning next year; and, ultimately, "2,250,000 tons per year" (*ibid.*). At the 1961 level of 1,000,000 tons, and the minimum contract price of $6.40 per ton, the preemption is $6,400,000 annually or $128,000,000 over the 20 year contract term.

For an irreducible period of 20 years, the contract eliminates any possibility of competition for coal business which in 1959 alone equalled the prior 700,000 ton consumption of coal in Peninsular Florida (R. 67). The petitioner itself estimated that within a very few years its requirements under the contract would exceed those of the balance of the entire State of Florida (PB 6).

By 1961, without reference to the subsequent increases, petitioner's coal requirements of 1,000,000 tons,

committed to this contract will exceed in fuel equivalent the combined requirements of all of petitioner's oil-burning plants (825,000 tons). (R. 31-32).

When the magnitude of the engrossment effected by this contract is compared with the standard established by this Court, there can be no debate as to the unlawful effect of the contract. In *International Salt*, where the tying contracts preempted only $500,000 of business annually (332 U.S. 395), this Court held that:

> "The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious" (332 U.S. 396).

In *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953), the Court confirmed the rule that evidence of the restraint of "a substantial volume of commerce" alone condemns a contract subject to Section 3 (345 U.S. at 608-609 (1953)).

The lower courts have adopted the same standard. In *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867, 873 (7th Cir. 1954) the court held that "the volume of business was substantial", for purposes of Section 3, with respect to requirements contracts preempting sales of "one-half million dollars per year". In *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764, 766 (6th Cir. 1936), only $325,000 worth of annual business, in a $66,000,000 dollar industry, was captured by the contracts invalidated under Section 3.

Further, the period of engrossment in the present case is unexampled. In *Standard Oil of California*, for example, most of the contracts were binding for only a six-month period (337 U.S. at 295-296, 305).

In *Standard,* the Court carefully analyzed the showing that had to be made as to the effect of requirements contracts. It pointed out that the purpose of Section 3 was to set up a "specific prohibition" of a practice thought to be beyond the reach of the Sherman Act (337 U.S. at 311). It noted that the bill originally contained no qualifying clause concerning the effect of the prohibited contracts, and it concluded that when the qualifying clause was added to the bill which became Section 3, there was no "intention seriously to augment the burden of proof" (337 U.S. at 312). It quoted one of the Senate conferees for the proposition "that even the elimination of competition in a single town would substantially lessen competition" (337 U.S. at 312, n. 15).

The facts of this case, then, measured by the statute and the decisions of this Court, are decisive that the engrossment is substantial. Petitioner, however, ignores both statute and controlling precedents. It seeks to avoid the conclusive effect of the enormous volume of coal, dollar amounts and period of years involved in the present contract by measuring the pre-empted volume, not in terms of its own significance or even of the coal market in Florida.[18] Instead, petitioner uses the total production of all coal producers in the 9 principal coal producing states in the country, including Kentucky, West Virginia, Pennsylvania, Illinois and Ohio, among others. (PB 39-42, n. 24).

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[18] The Bureau of Mines publishes figures for coal consumption in the entire states of Georgia and Florida combined. Even on this basis, the 1959 requirements under this contract, 700,000 tons, are 18% of the total for both states. The eventual 2,250,000 tons would undoubtedly be a far greater percentage in the relevant years. See *United States Department of Interior, Bureau of Mines, Mineral Market Report, M.M.S. No. 3035,* p. 23.

Petitioner's method is fallacious. The market involved is not the entire nation and foreign countries to which these producers sell their coal. It is the market in which this preclusive contract operates and from which it excludes "a competitor or competitors of . . . the seller". This is evident from *Standard Oil of California, supra.* It made no mention whatever of the overall production of refiners serving, among other areas, the "Western area" (337 U.S. at 295). The market percentage there mentioned was the ratio of the sales preempted by the requirements contracts to total sales in the relevant area. That percentage was only 6.7% (337 U.S. at 295, 305). This compares with the present contract's 1959 preemption of 18% of the coal sold by all suppliers in Florida and Georgia. See note 18, p. 35, *supra.*[19]

To sum up: The contract which petitioner would enforce clearly effects a substantial "lessening" of competition within the meaning of Section 3. This is so whether the "quantitative substantiality test" is applied (*Standard of California,* 337 U.S. at 298) or whether a percentage of the "relevant market" is considered. Under either standard there is a forbidden preemption which actually excludes competitors from a substantial market for an unreasonably long period of 20 years.

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[19] When the Department of Interior fixed minimum prices for bituminous coal, under the Bituminous Coal Act of 1937, "Common Consuming Market Areas" had to be established for that purpose (50 Stat. 79). The market area in which petitioner's utility is located was No. 126. It embraced Peninsular Florida and part of Georgia. See *Examiners' Proposed Findings of Fact, Conclusions of Law, General Docket No. 15, Bituminous Coal Division, United States Department of Interior, Appendix B, pp. 50-51; Vol. 126, Record of Proceedings of Docket No. 15, National Archives, Exhibit No. P-406.*

4. The application of Section 3 is not restricted to situations in which the seller is dominant or possesses economic leverage to compel the buyer to enter into the preclusive arrangement.

Petitioner predicates much of its argument on the premise that Section 3 prohibits a contract only where the seller has market dominance or economic leverage over the buyer. This Court has held the precise contrary of that proposition.

In *Standard of California, supra,* the Court expressly recognized that the seller did not have a dominant position in the market.[20] It nevertheless applied Section 3 to Standard's requirements contracts with its dealers. The Court also carefully analyzed the possibility of requiring that the application of Section 3 to requirements contracts be based upon the seller's "degree of market . . . dominance". It rejected the test. 337 U.S. at 307-308.[21]

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[20] The Court said ". . . Standard's share of the retail market for gasoline . . . is hardly large enough to conclude as a matter of law that it occupies a dominant position, nor did the trial court so find" (337 U.S. at 302). At p. 309, the Court also said "We assume further that the duration of the contracts is not excessive and that Standard does not by itself dominate the market."

[21] Petitioner quotes the dissenting opinion in *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 402 (1953), in an effort to show that *Standard Oil* recognized that the dealers might make "exclusive contracts" (PB 56). But the passage quoted from the dissent obviously means that dealers can make such contracts provided that they remain free to deal with others if they so desire. The quoted passage refers to p. 314 of the opinion in *Standard Oil* which states (337 U.S. at 314):

> ". . . if in fact it is important for retail dealers to assure the supply of their requirements by obtaining the commitment of a single supplier to fulfill them, *competition for their patronage* should enable them to insist upon such an arrangement, *without binding them to refrain from looking elsewhere.*"

Subsequently, in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953), the Court again considered the point. It distinguished the requirements of Section 1 of the Sherman Act from the precise and definite provisions of Section 3 of the Clayton Act. As to the Clayton Act, it expressly held that Section 3 is violated "[w]hen the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the tied product is restrained" (345 U.S. at 608-609). It is important to note that the Court's opinion itself italicizes the word "or", indicating its emphasis upon the disjunctive.[22]

In *Times-Picayune*, which petitioner ignores, it was emphasized that only as to Section 1 of the Sherman Act is there a dual requirement of the seller's "monopolistic position" *and* the restraint of a "substantial volume of commerce". Consequently, petitioner gains no support from its citation of *Northern Pacific* as authority for the argument that the contract is not illegal because the seller had no "economic leverage" (PB 33). The *Northern Pacific* case arose only under Section 1 of the Sherman Act (356 U.S. at 3-4). It involved no Section 3 issue.[23]

Section 3, by specific provisions, makes unlawful the prescribed category of contracts subject only to a

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[22] The dissent in the *Northern Pacific* case, 356 U.S. 1, 14, n. 2 (1958), also noted this Section 3 criterion in *Times-Picayune*.

[23] Additionally, the *Northern Pacific* passage quoted by petitioner is not comparable on the facts. It refers to the terms of sale of daily food purchases for household use. This is not analogous to a requirements contract foreclosing all competition for the business of the largest industrial buyer in the community for a period of twenty years.

showing that the effect of the sale or of the condition eliminating a competitor or competitors "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." It makes no distinction between situations on the basis of "dominance" of sellers or buyers; it contains no requirement that the unlawful contract must have been imposed on one of the parties by the other. This Court has made it clear that it will not import additional requirements into the application of Section 3.[24] It has insisted, in connection with the specific and detailed provisions of the Clayton Act, that the Court "cannot supply what Congress has studiously omitted." *Federal Trade Commission* v. *Simplicity Pattern Co.* (a Section 2 case), 360 U.S. 55, 67 (1960).

As a practical matter, Section 3 could not be limited to situations where the seller has dominance, or leverage, or superior bargaining power without frustrating its purposes and inviting a host of preclusive arrangements. In our economy, it is frequently the buyer that has superior economic power. For example, General Motors might buy its automobile radios from a single, relatively weak supplier. If this were done on a 20-year requirements contract, can there be any doubt that it should and would be condemned by Section 3? The Great Atlantic & Pacific Tea Co. might contract to buy its total requirements of canned peaches for 20 years, from a single, relatively small producer to the exclusion of that producer's competitors. Certainly, such an arrangement would violate Section 3.

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[24] See *Standard of California*, *supra*, 337 U.S. at 313.

In either case, the effect of the agreement would be, in the language of Section 3, that "the purchaser thereof shall not . . . deal in the goods . . . of a competitor or competitors of the . . . seller."

From a competitive standpoint it does not matter whether the preemptive agreement is imposed by the seller or the buyer, or whether it is voluntarily negotiated between parties of equal strength. Whatever the impetus, "observance by [the buyer] of his requirements contract with [the seller] does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage" (*Standard Oil Co. of California, supra,* 337 U.S. at 314).

If a seller's "leverage" limitation were read into Section 3, the statute would have little or no application to the soft coal industry, and coal producers would, *pro tanto,* be at the mercy of large users who could at any time, in effect, make captives of their suppliers. It is a chronically depressed industry in which buyers historically dominate sellers. This Court long ago recognized that excess productive capacity made " 'the market for coal a buyers' market for many years past' " (*Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344, 364 (1933)). This condition impelled the passage of the Bituminous Coal Acts of 1935 and 1937. See *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 395 (1940); H. Rep. No. 1800, 74th Cong. 1st Sess., pp. 1-2; S. Rep. No. 470, 74th Cong., 1st Sess., p. 2; S. Rep. No. 252, 75th Cong., 1st Sess., p. 2.

The same condition persists today. The industry is described as "economically ill" in a 1960 Congressional report which recommended legislation—enacted

as P.L. 86-599, 86th Cong., 2d Sess.—to promote the development of new uses for coal. H. Rep. No. 1241, 86th Cong., 2d Sess., p. 7. Petitioner describes coal as "one of the most competitive products in the country" (PB 40). It agrees that when it made the contract with respondents' predecessor, "the seller was faced with intense competition in the depressed coal industry" (*ibid.*, note 21).

Beyond this the economic leverage concept would seriously encumber the administration of Section 3. To demand evidence of the parties' comparative economic strength "would be a standard of proof if not virtually impossible to meet, at least most ill-suited for ascertainment by courts" (*Standard Oil Co. of California, supra*, 337 U.S. at 310).

5. Petitioner's attempted economic justifications are irrelevant.

This Court has held, in its comprehensive opinion in *Standard of California*, that Section 3 is "a narrowly directed statutory provision" subject only to the "broadly phrased qualification" requiring a showing that the effect of the prohibited agreement or of the exclusion of competition "may be to substantially lessen competition . . . in any line of commerce" (337 U.S. at 312). The Court exhaustively reviewed many possible benefits of requirements contracts, but held that the "Congress has authoritatively determined that those practices are detrimental where their effect may be to lessen competition" and that "[i]t has not left at large for determination in each case the ultimate demands of the 'public interest' " (337 U.S. at 311).

Nevertheless, petitioner urges that consideration be given to the alleged fact that the contract was "eco-

nomically necessary to both buyer and seller", and to the circumstance that the contract "created competition" with the oil industry in Peninsular Florida (PB 38, 43-47). Petitioner also states that both the buyer and seller made substantial investments in facilities to ship and receive the coal (PB 42).

It is clear that the contract was not necessary to enable the petitioners to obtain its coal requirements. As we have previously noted, petitioner admits that there are over 700 coal producers which produce coal suitable for its requirements; and according to the graphic statement of petitioner's president, petitioner received "innumerable offers of coal at various prices per ton". See pp. 31-32, *supra*. The lack of necessity in the present case for a 20 year requirements contract is further evident from petitioner's replacement contract with Love & Amos Coal Company. As already noted, this expressly provides: "Cancellable on 12 months notice by supplier or purchaser" (R. 27).

Similarly, there is no basis for relating the construction of facilities for handling and utilizing coal to this particular unlawful contract. Those facilities could equally be used under a lawful contract, and petitioner is apparently having no difficulty in using its facilities.

In any event, this type of economic justification is of no avail under Section 3, as this Court has held. In *Standard Oil Co. of California*, this Court expressly reviewed each of the possible economic justifications of requirements contracts, and held that, in view of the explicit prohibitions in Section 3, they would not exonerate the contracts. One of the specific considerations reviewed and rejected was "in the case of the buyer,

they may assure supply, afford protection against rises in price [and] enable long term planning." In the case of sellers, the Court pointed out and rejected the importance of "a predictable market" "of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified" (337 U.S. at 306-307). Such considerations cannot override the public-policy mandate of Section 3, even if the value of the investments is in fact impaired by the invalidation of the contract. Cf. *Continental Life Ins. Co.* v. *United States*, 259 U.S. 156, 171 (1922).

More broadly in *Standard Oil Co. of California, supra,* the Court reviewed, but rejected as irrelevant, all of the various economic considerations pressed by petitioner here. In discussing the possible advantages of requirements contracts, it said (337 U.S. at 306-307):

> "Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. In the case of the buyer, they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, give protection against price fluctutations, and—of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified—offer the possibility of a predictable market. See Stockhausen, The Commercial and Anti-Trust Aspects of Term Requirements Contract, 23 N.Y.U.L.Q. Rev. 413, 413-14 (1948). They may be useful, moreover, to a seller trying to establish a foothold against the counterattacks of entrenched

> competitors. See id. at 424 et seq.; Excelsior Motor Mfg. & Supply Co. v. Sound Equipment, Inc., 7 Cir., 73 F. 2d 725, 728; General Talking Pictures Corp. v. American Tel. & Tel. Co., D.C. Del., 18 F. Supp. 650-666. . . ."[25]

The Court held that all such considerations were immaterial because Congress had determined the economic policy questions by its enactment of Section 3. (337 U.S. at 311; see quotation at p. 41, *supra*).

Similarly, it would not matter, if it were true, that the contract had the "economic" benefit of inducing the reduction of oil prices in Florida. In *Standard Oil Co. of California, supra*, the Court noted that the use of requirements contracts tends to freeze out competition and answered, as follows, the claim that they lowered costs (337 U.S. at 309):

> ". . . If, indeed, this were a result of the system, it would seem unimportant that a short-run by-product of stability may have been greater efficiency and lower costs, for it is the theory of the antitrust laws that the long-run advantage of the community depends upon the removal of restraints upon competition. . . ."[26]

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[25] By its express citation of the case as supporting this rejected consideration, the *Standard* decision implicitly overruled *Excelsior Motor Mfg. & Supply Co. v. Sound Equipment, Inc.*, 73 F. 2d 725 (7th Cir. 1934), *cert. denied*, 294 U.S. 706 (1935), cited by petitioner at page 46 of its Brief.

[26] *Cf. Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951), in which the Court held that restraints of competition cannot be justified even if their purpose is to reduce prices.

Petitioner refers at length to cases arising under the Natural Gas Act (PB 44-46, 48-51). It admits that these cases deal with a regulated public utility and that they do not involve the antitrust laws or Section 3 of the Clayton Act (PB 49). Petitioner says they are cited primarily "as illustrative of the economic background and necessity" of a contract like the present (*ibid.*). But they are not material here.

In the case of the natural gas industry and certain other segments of our economy, Congress has determined that regulation of rates and facilities is the appropriate course. In the case of coal and most of our economy, our national policy is based on the premise that our economic, political and social welfare are best served by keeping "the channels of competition free so that prices and services are determined by the workings of a free market."[27] *Cf. McLean Trucking Co.* v.

[27] This quotation is part of the following apt analysis of the Court of Appeals for the District of Columbia Circuit in *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 193 F. 2d 230, 234 (D.C. Cir. 1951), *affirmed*, 343 U.S. 414 (1952):

> ". . . The Sherman Act, 15 U.S.C.A. §§ 1-7, 15 note, and related laws represent an attempt to keep the channels of competition free so that prices and services are determined by the workings of a free market. They derive from the conviction that the greatest good to the greatest number will be attained by preventing monopoly, monopolizing and combinations in restraint of trade. In marked contrast is a statute such as Part II of the Federal Power Act. It evidences congressional recognition that competition can assure protection of the public interest only in an industrial setting which is conducive to a free market and can have no place in industries which are monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business. In place of competition as a generalized and indirect regulator of prices and services in the field of interstate transmission of electric energy at wholesale, Congress has substituted a regulatory agency authorized to supervise almost every phase of the regulated company's business."

United States, 321 U.S. 67, 83-86 (1944); *United States v. Radio Corporation of America*, 358 U.S. 334, 350-351 (1959).

Petitioner is a public utility, but its exemption from the normal rules of competition is limited. It does not extend to the entire market place, as some of petitioner's comments seem to propose. If it should buy natural gas, it would be dealing in a market regulated by statute and the Federal Power Commission. The permissible rates, the terms of the contract, its duration and its exclusivity would be fixed by rules based in large part upon considerations designed to promote "the financial integrity of the [natural gas] enterprise"; upon conservation considerations; upon assuring a fair "return of equity", etc. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 506 (1949).

But when petitioner enters the coal market, it is purchasing an unregulated commodity to which Congress has applied the rules of competition under the antitrust laws. Congress abandoned its brief experiment with a regulatory system, including price-fixing, in the coal industry when it permitted the Bituminous Coal Act of 1937 to lapse in 1943. See 15 U.S.C. (1946 ed.) §§ 828-849 and codification note.

The very gas cases cited by petitioner illustrate the subordination of competitive standards to rate-making criteria in a regulated industry. In the *Houston* case the deletion of cancellation clauses from the 20 year contracts was ordered on the precise ground that rate-making factors overrode competitive considerations. See *Matter of Houston Texas Gas and Oil Corp.*, 16 F.P.C. 110, 132, 136 (1956), *affirmed sub nom.*

Florida Economic Advisory Council v. *Federal Power Commission*, 251 F. 2d 643 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 959 (1958). The same economic criteria ruled irrelevant in *Standard Oil Co. of California*, pp. 41-44, *supra*, were held controlling not only in the *Houston* case, but also in the other regulatory cases cited by petitioner (PB 48-49), namely, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).[28]

This Court is all too familiar with predictions such as that advanced by petitioner that "the decision below [enforcing the Clayton Act] will cause grave injury to the economic life of the country" (PB 47). This is a familiar theme in antitrust cases. The answer is set out in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 561-562 (1944). As the Court there said, quoting Justice Harlan, speaking for the Court in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 351-352 (1904):

> "'. . . The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of

[28] Petitioner is not aided by *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U.S. 353 (1931)—cited at pages 48, 49 of its brief. That case did not involve the Federal antitrust laws nor did the Court mention those laws. It arose under the state laws of Arkansas, which contained no counterpart of Section 3.

such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy.'"

Contrary to petitioner's thesis, really grave injury to the national interest would come about if this Court should hold that a buyer may obtain the aid of the courts to compel performance of a contract confining a substantial amount of commerce to a single seller for 20 years. This would be a grant of an official patent to powerful enterprises like the public utilities, General Motors, the A&P, and hundreds of others to engross commerce for long periods, to remove large segments of trade from the competitive market, and, in effect, to make captive producers and distributors throughout our economy.[29]

The present contract is, in fact, an extreme example of the elimination of competition. It opposes the basic purpose of the antitrust laws to assure freedom of access by sellers and buyers to "outlets" and "sources" (*Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457, 465 (1941)). As we have shown, the outlet from which the present contract forecloses competitors is not merely "substantial". It is huge. It engrosses the coal business of an

[29] Even a patent monopolist is forbidden by the federal antitrust laws to market his invention on terms restricting the customer's use of competitive processes or goods. *National Lockwasher Co.* v. *George K. Garrett Co.*, 137 F. 2d 255 (3rd Cir. 1943); *McCullough* v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), *cert. denied*, 335 U.S. 813 (1948); *Dole Refrigerating Co.* v. *Kold-Hold Mfg. Co.*, 185 F. 2d 809, 816-817 (6th Cir. 1950), *modifying and affirming* 86 F. Supp. 323 (E.D. Mich. 1949).

electric utility monopoly serving an area which is admittedly "over 1½ times as large as the state of Rhode Island [and] which contains 11 per cent of the population of Florida" (R. 63).

6. The purpose of Section 3 is to prevent contracts such as the contract at issue. Petitioner's resort to legislative history is neither relevant nor reliable.

We have submitted that the test of Section 3 and the decisions of this Court answer petitioner's arguments with completeness unusual in antitrust litigation. Faced with the words of the statute and the decisions of this Court, petitioner seeks an escape through the murky passage of the legislative debates.

As early as 1922, this Court, in a Section 3 requirements case, rejected resort to legislative history for purposes of determining the application of the Section, on the grounds that the statute is clear and the legislative history is extraneous and unsatisfactory. It held in *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 357 (1922):

> "The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and, in the section [Section 3] under consideration, to determine their legality by specific tests of its own, which declared illegal contracts of sale made upon the agreement or understanding that the purchaser shall not deal in the goods of a competitor or competitors of the seller, which 'may substantially lessen competition or tend to create a monopoly.'
>
> *Much is said in the briefs concerning the reports of committees concerned with the enactment of this legislation, but the words of the act are plain, and their meaning is apparent, without the necessity of*

resorting to the extraneous statements and often unsatisfactory aid of such reports".[30]

The wisdom of this rule becomes graphically apparent by a comparison of petitioner's brief with the actual record of the legislative proceedings relating to Section 3 of the Clayton Act. The miscellaneous variety of utterances, which petitioner refers to as "legislative history",[31] are directly contradicted, on every point, by other utterances of equal or greater dignity.[32]

As briefly as possible, we shall demonstrate this point—and incidentally, shall establish that if resort is had to material of this type, it supports each of our contentions in this case.

Petitioner contends that the "legislative history" shows that Congress was concerned with "attempts by powerful sellers to monopolize the market". By a self-serving selection of quotes, it seeks to convey the impression that the Congress intended to reach *only* preclusive arrangements imposed by "powerful sellers".

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[30] This is the general rule. See *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1944); see also *Caminetti* v. *United States*, 242 U.S. 470, 485, 490 (1917); *Wilbur* v. *United States*, 284 U.S. 231, 237 (1931).

[31] Even including a colloquy between a lawyer and a member of Congress serving on the House Judiciary Committee (PB 27).

[32] Petitioner refers to this Court's opinion in *Standard Oil Co. of California, supra*, as demonstrating that reference to legislative history is appropriate. But the contrast is striking. This Court's monumental opinion in *Standard of California* refers to legislative history, to support its clear reading of the text of the statute, in the correct and technical sense of that term: to the history of the text of the bills in the course of their passage, as disclosed by amendments and the explanations of the floor managers of the bill

The remarks of Congressman Floyd on this subject on May 23, 1914, are quoted with approval (PB 26). On May 28, 1914, Congressman Floyd made it clear that the Section would also outlaw such contracts if made by the "small man". In response to the expression of concern as to the consequences which would result from depriving the "independent, small manufacturer" of the opportunity to make exclusionary contracts, he said:

> "... suppose one [small manufacturer] does get in and gets an exclusive contract of some kind, then you have two monopolies, and you never get beyond monopoly. If you had three or four, they would all result in restrictive monopolies, and in the meantime the American public are denied many conveniences, and denied them by means which are tending all the time to build up monopoly." (51 Cong. Rec. 9402, May 28, 1914).

Senator Reed, also quoted by the petitioner (PB 26-27), recognized that the Section would be generally applicable. He said:

> "It has been urged that Section 4 [now Section 3] will stop the weak concerns from being able to compete with the great concerns. Mr. President, there is not a single practice that is prohibited by Section 4 that cannot be used by the great concern against the small concern with a thousand times more effect than it can ever be used by the small concern against the great concern." (51 Cong. Rec. 14270, August 26, 1914).

Congressman Webb, one of petitioner's favorite sources (PB 24-25), acknowledged that the Section might be irksome to "small concerns" but he foresaw net benefit to them. During the debates he was asked by Congressman Willis to comment on

> "... protests from small concerns [who] ... take this position, that the only way that they have been able to sell their product is by making exclusive trade agreements with agents in different cities of the United States" (51 Cong. Rec. 9072, May 23, 1914.)

Congressman Webb answered (*ibid.*):

> "I think the small concern which the gentleman mentions has been compelled to adopt that method by the very trusts that first adopted it. He is compelled to adopt it as a matter of self-defense. ..."[33]

Congressman Webb also emphasized that Section 3 was deliberately designed to reach any single contract covered by its language. He stated (51 Cong. Rec. 9406, May 28, 1914):

> "... One act, one contract, would not come within the meaning of the Sherman antitrust law, but a series of acts, *each one of which we condemn in this section*, would bring them within the terms of the Sherman Antitrust law, and *what we are trying to do is to forbid the various individual acts which irresistibly lead to monopoly.*"

The Committee Reports, to which petitioner also refers, shows the purpose to reach all types of individual agreements, "singly and in themselves", in their incipiency, and even if their effect is highly localized. The Senate Report declares (S. Rep. No. 698, 63rd Cong., 2d Sess., 1914, p. 1):

> "... Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to pro-

[33] Moreover, during the debate on the Clayton Act, a proposed amendment to exempt small companies (capital less than $5,000,000) from Section 3 was rejected. See 51 Cong. Rec. 9388-9389 (May 28, 1914).

hibit and make unlawful certain trade practices which, as a rule, *singly*, and in *themselves*, are not covered by the Act of July 2, 1890, or other *existing* antitrust acts, and *thus, by making these practices illegal*, to arrest the creation of trusts, conspiracies, and monopolies *in their incipiency and before consummation.*"

The House Report states (H. Rep. No. 627, 63rd Cong., 2d Sess., 1914, p. 12):

"... What is the motive and purpose of the manufacturer making or entering into such exclusive contracts? It is undoubtedly his purpose to drive out competition and to establish a monopoly in the sale of his commodities *in that particular community or locality.*"

We shall not burden this Court further with discussion of this point. If any conclusion is to be drawn from the legislative proceedings, it is that they reenforce the comprehensive application of the Act, in conformity with its construction and application by this Court. Viewing the legislative history most favorably to petitioner, the controlling principle was stated by this Court in *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945):

"... The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. This is such a case."

If anything is clear from the specific words and the legislative background of Section 3, it is that Congress was concerned not only with protecting consumers and buyers from exclusionary restrictions, but also with preserving the equal opportunity of all vendors to

reach the market, free of exclusionary arrangements between any buyer and any seller. This intention, apparent on the face of Section 3, is nowhere mentioned by petitioner.[34]

C. THE COURTS WILL NOT ENFORCE THE PRESENT UNLAWFUL CONTRACT, AND THE SELLER MAY AVAIL ITSELF OF THE DEFENSE.

We believe that, as we have shown, every point made by the petitioner in defense of the present contract is opposed by direct adjudications of this Court in Section 3 cases. Petitioner's final point does not relate to the legality of the contract. It assumes a violation of Section 3. The contention is that petitioner is nevertheless entitled to a judgment declaring the contract to be valid and lawful, and enforcing it "according to its terms". This contention is based upon the assertion that the "sole purpose of Section 3 of the Clayton Act is the protection of buyers, as a class . . ." (PB 52). The unlawful conduct, petitioner asserts, is that of the seller alone, and the statutory violation is no defense against a buyer's action to compel performance of the contract (PB 52-59).

The mere assertion of petitioner's proposition discloses its fallacy. Petitioner is asking this Court to declare that a contract which violates § 3 is lawful. This is not an action to recover for goods sold and delivered, or to require a party to pay for benefits received by him. On petitioner's own hypothesis, it is asking this Court to command the seller to proceed, for twenty years, with the performance of an unlawful act.

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[34] Compare the holding in *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 546 (1960), that "an independent and important goal of Section 2 is to extend protection to competitors of the seller."

On page 58 of its brief, petitioner refers to this Court's opinion in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), and by this reference demonstrates the paradox of its contention. Petitioner says, and we agree, that "the defense of illegality" should be narrowly confined; but petitioner also admits, as it must, that the defense is available in "those cases where 'the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act' " (PB 58).

Yet that is precisely the present case: Petitioner has filed an action for a declaration that the present contract "is a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, according to its terms" (R. 6). If this contract is unlawful, this is a prayer for enforcement of the precise, unlawful conduct. No coal has been delivered under the contract. The relief prayed by petitioner is an order requiring the seller to perform the exclusionary contract for 20 years. i.e., "the precise conduct made unlawful by the Act". The prohibited conduct is the contract itself, not a collateral agreement.[35]

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[35] This distinguishes the present case from *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 (1947), where the Court was careful to state (330 U.S. at 756):

> ". . . It is only when the Court goes outside of the dealings between plaintiff and defendant and it is proved that the same kind of cans were sold to others at different prices within a relevant period of time, amounting to a discrimination—a fact unnecessary to sustain the plaintiff's cause of action—that the basis of the defense asserted here appears. . . ."

The same circumstance differentiates *D.R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165 (1915), *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902), and *A.B. Small Co.* v. *Lamborn & Co.*, 267 U.S. 248 (1925), cited at page 58, notes 34 and 35, of petitioner's brief. Compare the distinction of *Connolly* in *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227 et seq. (1909).

The application of the quoted precept of *Kelly* v. *Kosuga*—refusing judicial relief enforcing unlawful conduct—does not depend on the identity of the party raising the defense. This court has often refused to enforce an unlawful contract at the instance of the person whose conduct violated the law. E.g., *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899); *Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U.S. 261, 276 (1881). It has also refused to enforce an unlawful contract even if the person seeking to enforce it did not commit the prohibited act. *Continental Insurance Co.* v. *United States*, 259 U.S. 156, 171-173 (1922); *Texas & Pacific Railway Company* v. *S. O. Pottorff*, 291 U.S. 245, 260 (1934); *Weil* v. *Neary*, 278 U.S. 160 (1929); *Sage* v. *Hampe*, 235 U.S. 99 (1914); *St. Louis V. & T.H.R. Co.* v. *Terre Haute & I.R. Co.*, 145 U.S. 393 (1892); *Gibbs* v. *Consolidated Gas Co. of Baltimore City*, 130 U.S. 396 (1889).

This phase of petitioner's argument also mistakenly assumes that Section 3 was enacted solely for the buyer's protection. Its express language shows a purpose to protect "a competitor or competitors of the lessor or seller."[38] It is an enactment of public legislative policy which is not to be subordinated to the private interest of any particular buyer.

Particularly where acts of Congress are concerned, neither ordinary estoppel doctrine, nor alleged pri-

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[38] A competing seller successfully sued for violation of Section 3 in *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764, 765 (6th Cir. 1936). "There is no precedent or reason for a rule *compelling* the seller to persist in illegal conduct at the risk of "civil suit by aggrieved competitors" (*United Cigar—Whelan Stores Corporation* v. *H. Weinrich Corp.*, 107 F. Supp. 89, 91 (S.D.N.Y. (Weinfeld, J.) 1952)).

vate bad faith, can preclude the assertion of defenses effectuating the public policy of the legislation. To quote Chief Justice Stone in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 177 (1942):

> "Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements . . . ."

As he further said in *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U.S. 249, 257 (1945):

> ". . . The interest in private good faith is not a universal touchstone which can be made the means of sacrificing a public interest secured by an appropriate exercise of the legislative power."

The rule was stated as follows in *W. R. Grace & Co.* v. *Civil Aeronautics Board*, 154 F. 2d 270, 283 (2d Cir., L. Hand, Swan and Frank JJ., 1946), *cert. dismissed*, 332 U.S. 827 (1947):

> "And even if the agreements when made were in violation of the antitrust laws, Grace would not be thereby estopped from asking to be relieved of them; a party to a contract violative of a statute cannot be estopped from repudiating it when such repudiation will further the very public interest which the statute was designed to protect."

The truth is, moreover, that the statute cannot sensibly be construed to make only the seller's act, but not the contract, illegal. Section 3 declares it "unlawful" to "make a sale or contract for sale" of the

prohibited type. It is a play on words to suggest that this language covers only the seller's act, as distinguished from the contract itself, and hence permits the buyer to enforce the contract. It takes two parties to make "a sale or contract for sale". The contract cannot be legal as to the buyer, but illegal as to the seller.

If the legislative history is material on this point, as petitioner says (PB 53), it supports the proposition that the Section makes the contract *unlawful*, and not merely voidable at the buyer's option. Congressman Floyd, one of petitioner's quoted experts, and a member of the House Judiciary Committee (PB 26), dealt at length with the effect of the change in Section 3 from a criminal to a civil prohibition. He repeatedly emphasized that the change made the "contract unlawful" (See 51 Cong. Rec. 16,317-16,319 October 8, 1914)). He analogized the effect of Section 3 to a

> "statute that declares that all gambling contracts are unlawful . . . . The contract is worthless" (51 Cong. Rec. at 16,318).

Addressing himself to "sections 2, 3 and 7" of the Clayton Act, he described the contracts they specify as "*void*" and further said they "declare that *every contract made* involving the things herein prohibited is unlawful" (51 Cong. Rec. at 16,319).

It is significant that the formula used in Section 3 appears throughout the Clayton Act. For example, Section 7 provides "that no corporation shall acquire" the stock or assets of another in certain circumstances. (38 Stat. 731, as amended 64 Stat. 1125; 15 U.S.C. § 18).

Under petitioner's argument, the selling company in an unlawful merger under Section 7 could never-

theless compel performance by the buyer, because the statute reads only that "no corporation shall acquire." If so, Youngstown Steel would be at liberty to enforce its merger agreement with Bethlehem notwithstanding the judicial determination that the agreement violated Section 7. *United States* v. *Bethlehem Steel Co.*, 168 F. Supp. 576 (S.D.N.Y. 1958). In a case now before the Court, G. R. Kinney Corp. could obtain a court decree compelling Brown Shoe Co. to buy Kinney's stock, even if it were found that the merger violates Section 7 of the Clayton Act. *Brown Shoe Co.* v. *United States*, No. 65, October Term, 1960.

Indeed, if it were supposed that a contract violating Section 3 could so far as antitrust is concerned, be enforced against the seller but not the buyer, the result would certainly be to create a new class of contracts unknown to our law—a contract binding upon one party but not the other. But obviously, such a "contract" would be void for lack of mutuality.

Apart from its error of principle, petitioner's thesis that the buyer can enforce the contract, despite the violation of Section 3, is patently unfair. Petitioner is really saying that it could have avoided the contract whenever a better offer came along, but the seller was nevertheless bound at petitioner's option. This contemplates a one-sided exception, in the buyer's favor, from the elementary contract principle requiring mutuality of obligation. Compare *Jarrett* v. *Pittsburgh Plate Glass Co.*, 131 F. 2d 674, 676 (5th Cir. 1942).

In the present situation, the unfairness of such a doctrine is palpable. On petitioner's thesis, the seller is bound to provide performance for the 20 year period of the contract, but the buyer, for example, could

terminate its performance after the first year. The injustice is accentuated by the fact that petitioner from the start had "information and notice" of the facts creating "the offending under the Anti-Trust Law" (*Continental Ins. Co.* v. *United States, supra*, 259 U.S. 156, 172 (1922)).

There is nothing to the contrary in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959). The *Culligan* Court emphasized that the buyers there—unlike petitioner—were not asking the Court to enforce an unlawful contract. The Court enforced the contract "*after excision of the requirements provision*" (274 F. 2d at 34). It could do so because the seller had previously agreed to a provision of a Federal Trade Commission consent order which deleted the exclusionary provisions of its agreements (274 F. 2d at 31-32). This deletion was possible under the *Culligan* contracts because, unlike this one, each contained severability clauses preserving the balance of the contract in the event that any provision should be declared illegal (274 F. 2d at 31).[37]

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[37] The passage from *Corbin on Contracts* recited in *Culligan* (274 F. 2d at 35) was not intended by Professor Corbin to apply to contracts violating the antitrust laws (cf. PB 54-55). This is made clear by Professor Corbin's previous comments concerning the impact of the Sherman and Clayton Acts on contracts within their coverage. He states in this regard (6 *Corbin on Contracts* § 1399, at p. 553):

> ". . . Any agreement that is within the provisions of either Act is necessarily an unenforceable agreement."

And he adds with specific reference to Section 3 (*id.* at p. 554):

> ". . . Any contract for exclusive dealing is a deprivation of opportunity to competitors. Such a contract is illegal if it is shown that the deprivation effected by it 'may be' 'substantial' in amount."

D. THE CONTRACT IS INVALIDATED BY SECTIONS 1 AND 2 OF THE SHERMAN ACT.

Although the lower courts did not reach the Sherman Act questions, they may be considered here. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951). As we have shown, the present contract is unlawful and the complaint should be dismissed under Section 3 of the Clayton Act, without reference to the Sherman Act. The undisputed facts, however, clearly establish that the contract is violative of the Sherman Act, as well as the Clayton Act.

First, its 20 year term is indefensible by Sherman Act standards. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953); *United States* v. *Pullman Co.*, 50 F. Supp. 123, 129 (E.D. Pa. 1943), *aff'd*, 330 U.S. 806 (1947); *United States* v. *American Can Co.*, 87 F. Supp. 18, 31 (N.D. Cal. 1949). Next, considering the substantial size of the market preempted, and the undisputed evidence of the suppression of the opportunities of hundreds of willing competitors of the seller (pp. 31-32, *supra*), the contract embodies an unreasonable restraint within the meaning of the Sherman Act. In *International Salt*, *supra*, the Court held as follows that the Sherman Act, as well as Section 3 of the Clayton Act had been violated (332 U.S. at 396):

> "Not only is price-fixing unreasonable, *per se*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150; United States v. Trenton Potteries Co., 273 U.S. 392, but also it is unreasonable, *per se*, to foreclose competitors from any substantial market. Fashion Originators Guild v. Federal Trade Commission, 114 F. 2d 80, affirmed, 312 U.S. 457."

Further, the monopoly which the contract created is prohibited by Section 2 of the Sherman Act. See,

e.g., *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268, 279 (1934); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 225-227 (1947); *William Goldman Theatres, Inc.* v. *Loew's Inc.*, 150 F. 2d 738, 744 (3d Cir. 1945), *cert. denied*, 334 U.S. 811 (1948). To quote the *Goldman* case (150 F. 2d at 744):

> "We know of no authority which sanctions what would otherwise be an illegal monopoly simply because it operates in a single city or a particular part of a city and affects only a part of an industry involved. There is no such limitation on the effect of the antitrust laws."

E. CONCLUSION

For the foregoing reasons, the decisions below should be affirmed.

Respectfully submitted,

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